No. 15,492

United States Court of Appeals

For the Ninth Circuit

FRANCES CARDINALE, ANN F. CARDINALE, HORACE A. CARDINALE and FRANK J. CARDINALE, Minors, by FRANCES CARDINALE, Their Guardian Ad Litem,

Libelants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Respondent.

Appeal from the United States District Court for the Northern District of California, Southern Division, in Admiralty.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The essential facts of the case reveal an effort by counsel for Libelants-Appellants to belatedly attempt to have the time for filing an appeal to this Honorable Court extended under the obviously improper theory that their own dereliction in not filing a timely Notice of Appeal should be overlooked because of alleged clerical error and inadvertence on the part of the Trial Judge and the Clerk of the District Court.

On January 12, 1956, the Honorable Michael J. Roche, Chief Judge of the District Court, filed a Memorandum Opinion (T.R. 10-17) in which Opinion the evidence of the case was reviewed and the conclusions of the Court, both as to the facts and the law, are clearly set forth. It was ordered in the Opinion "That a decree be entered upon findings of fact and conclusions of law in favor of respondent, and against libelants." (T.R. 17.)

Proctors for the respondent, Union Oil Company, then—prepared formal Findings of Fact and Conclusions of Law in summary of the Trial Judge's own Memorandum Opinion. These Findings were properly served on Proctors for Libelants-Appellants by mail and the formal judgment on the Findings was signed and filed on January 30, 1956. (T.R. 23.)

Respective Stipulations ordered thereon allowed Proctors for Libelants-Appellants until February 29, 1956, to file objections to these Findings. (T.R. 30-31.)

These objections were filed on February 29, 1956. (T.R. 30.)

On March 14, 1956, oral arguments were heard by the Trial Judge, (T.R. 32) and on April 10, 1956, an Order was signed by the Trial Judge overruling the objections filed and disallowing the proposed counter-findings. (T.R. 32.)

Nothing further was done by Proctors for Libelants-Appellants until December 18, 1956,—*after a lapse of time of over eight months* from the Order disallowing the objections of February 29, 1956. Then on Decem-

ber 18, 1956, an ex parte application was made by Proctors for Respondents-Appellees for a *nunc pro tunc* order setting aside the Findings of Fact and Judgment.

This Motion was denied by the Trial Judge (T.R. 33) and on March 12, 1957, a Notice of Appeal was filed (T.R. 33) appealing from the Order of the Trial Judge in denying Libelant's Motion for Order *Nunc Pro Tunc.*

The transcript of the record does not contain any transcript of the evidence of the witnesses who testified at the trial and we are therefore not attempting to review the facts concerning the litigation between the parties.

SPECIFICATIONS OF ALLEGED ERRORS RELIED UPON BY APPELLANTS.

Only three specifications are set forth (page 4, Appellants' Brief) which are as follows:

1. The District Court erred in allowing the judgment to be entered on January 30, 1956.

2. The District Court erred in refusing to enter a written order in conformity with its oral order of March 14, 1956, thus depriving Libelants-Appellants of due process of law by jeopardizing Libelants' rights of appeal, without knowledge of Libelants.

3. The District Court erred in denying the Libelants' Motion to enter an Order *Nunc Pro Tunc* setting aside findings of fact, conclusions of law and judgment thereon.

APPELLANTS' ARGUMENT.

The Summary of Argument (Appellants' Brief, page 5), contains four points which may be properly condensed as follows:

1. The judgment was entered through clerical error and inadvertence and thus was not an act of judicial discretion and hence should not be allowed to stand.

2. The Judgment was a void Judgment because Appellants had no opportunity to enter Objections to the Judgment on the Findings.

3. The Trial Court had the duty to enter a written Order *Nunc Pro Tunc* because he permitted Appellants to file Objections and heard oral arguments thereon.

4. That the denial of the Motion *Nunc Pro Tunc* constitutes a deprivation of due process of law which jeopardized Appellants' rights of appeal without knowledge of the Appellants.

ARGUMENT.

We will now answer the argument of Appellants in the order set forth in their Brief.

I.

THE JUDGMENT WAS A FINAL JUDGMENT AND AN ACT OF JUDICIAL DISCRETION.

A number of decisions are set forth in Appellants' Brief to the effect that a Trial Judge has the power

to correct judgments entered through mistake or error. With this contention we are in accord.

The case of *Sabine Hardwood Co. v. West Lumber Co.,* 238 Fed. 611 (D.C. Tex. 1916) cited by Appellants well illustrates that right but has absolutely no relevancy to the case at bar. In the cited case the size or acreage of a parcel of land in litigation has been improperly described in the judgment entry through mutual mistake. That the Judge had the right to correct such mistake was the holding of the case.

Such is the effect of *Federal Rule* 60 (b).

We likewise do not see the relevancy of cases such as *Fox v. Smith,* 30 Fed. 2d 869 (C.C.A. D.C. 1929) cited by Appellants in which the Clerk, without authority, entered an order dismissing an action without prejudice and holding that such act was void.

We have carefully read each case cited by Proctors for Appellants all of which we find not to be factually even remotely close to the questions and issues raised in this Appeal and as heretofore stated we are in accord that a Trial Judge is given great powers both in law and in equity to amend, correct, augment or supplement his orders, judgments or findings.

We likewise recognize that a Clerk of any Court has certain acts to perform where he acts in a purely ministerial capacity and would in such instances not act in a judicial function.

We likewise know that a judge sitting on the Admiralty side of the Court has the right to correct and amend his orders, judgments or findings. (With certain limitations.)

We most respectfully disagree with Proctors for Appellants that the judgment entered in this case was one which had been entered through lack of judicial discretion or as the result of any clerical error or inadvertence.

As was pointed out in Appellants' Brief (page 10), the issue is one of the Judge's intent and the best evidence is the Judge's own statement, either expressed or implied, from his orders.

It seems clear to us that when the Trial Judge signed and filed his Opinion and the Findings that were drafted pursuant thereto followed by an Order on the Findings, that a Judgment had been properly and completely entered and carried out the full decision and intent of the judge to give judgment adverse to appellants.

Could the fact that the Court permitted Appellants to later file Objections, according them a hearing and then denied their Objections to the Findings that had been entered have the effect of leaving the formal entered judgment in a position to be called void? We think not.

Libelants-Appellants' entire appeal is based on an erroneous conception on their part that there was some type of clerical error involved in the signing of the Findings and the entry of judgment which permits their right of appeal to continue indefinitely.

Their interpretation of Rule 60, *Federal Rules of Civil Procedure* is that after the Court had disallowed and overruled their Objections to the Findings that

were signed and disallowed their proposed counter-findings, that a violation of Rule 60 had been committed which gave them an indefinite extension of rights of appeal for a period of over eight months when they filed the instant Notice of Appeal.

This Honorable Court in the case of *Perrin v. Aluminum Co. of America,* (C.C.A. 9, 1952), 197 Fed. 2d 254 in part said (p. 255):

> "* * * Rule 60(b) was not intended to be resorted to as an alternative to review by appeal, nor as a means of enlarging by indirection the time for appeal except in compelling circumstances where justice requires that course. Cf. *Hill v. Hawes,* 320 U.S. 520, 64 S. Ct. 334, 88 L. Ed. 283. Appellants had opportunity to obtain appellate review of the very rulings of which they now complain but failed to take advantage of the opportunity within the time prescribed by rule 73(a). *Having in consequence of their own lack of diligence been turned away at the front door they now seek entry at the rear.* Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal." (Added emphasis ours.)

The time for appeal from the judgment of January 30, 1956, was clearly extended by the Courts granting them permission to file their Objections and was suspended until the Order overruling their Objections was entered on April 10, 1956.

In the case of *McConville v. United States,* (C.C.A. 2, 1952), 197 Fed. 2d 680 the Court well stated the rule as follows (p. 682):

"We must first dispose of the plaintiff's contention that the Government's Appeal is too late. This is based on the fact that the latter's notice of appeal was filed more than sixty days after the initial judgment of August 13, 1951, based on a memorandum and findings of that date. It was, however, well within the time if computable from the court's order denying the timely motion to amend and add to the findings in several substantial particulars and to retax the costs and amend the judgment accordingly. Even under the older law, such a substantial motion would, it seems, have suspended the running of the time for appeal. *Leishman v. Associated Wholesale Electric Co.,* 318 U.S. 203, 63 S. Ct. 543, 87 L. Ed. 714. At any rate the question is no longer doubtful; for the Amendment to Fed. Rules Civ. Proc. rule 73(a), 28 U.S.C.A., effective March 19, 1948, while materially shortening the time for appeal, specifically excepted the time for consideration of a motion *inter alia,* to amend or make additional findings of fact under Fed. Rule 52(b)."

We therefore seriously doubt that there is even an appealable order before this Court.

McConville v. United States, (supra);

Steccone v. Morse-Starrett Products Co. (C.C.A. 9, 1951), 191 Fed. 2d 197.

The *Steccone* case is later in this Brief discussed.

II.

THE JUDGMENT ENTERED WAS A FINAL JUDGMENT.

Appellants cite a considerable number of cases concerning the effect of a Court entering judgment before the trial had been concluded, which cases we again respectfully submit have no bearing on the case at bar.

In *Golpin v. Page,* 18 Wall. 350, 21 L. Ed. 959 (1874) cited by Appellants concerned the lack of jurisdiction of the Court to enter a judgment against a non-resident minor defendant.

Pickering v. Palmer, 18 N.M. 473, 138 Pac. 198, concerned the efforts of a justice of the peace to have a trial before the summons to appear at the trial was returnable.

Moore v. Smith, 177 Va. 621, 155 Atl. 2d 48, likewise cited by Appellants concerned another effort by a justice of the peace to enter a judgment three days before the defendant had been summoned to appear.

Needless to say the cases properly held that the justice of the peace violated all well known rules of due process of law.

The case of *Schmidt v. Terry* (C.C. N.Y.), 111 Fed. 290 (1901) merely holds that where the trial judge ordered a stay or entry of judgment pending a motion for a new trial that the entry of judgment without an order denying the new trial was improper practice and should be vacated.

The cited case of *Lampel v. Goldstein,* 167 N.Y.S. 576 (1917) which appellants state in their brief to be

closely analogous to the instant case (Appellants' Brief, page 17) involved the efforts of a Municipal Judge to enter a judgment four days before the case was ready for submission and during a continuance of the actual trial.

We state that the Court did give Proctors for Appellants their day in Court, there was a complete trial, and full opportunity was accorded appellants to object to the findings which was carried out by written objections, written proposed counter findings and orally argued.

This Honorable Court held in the case of *Steccone v. Morse-Starrett Products Co.,* (C.C.A. 9, 1951), 191 Fed. 2d 197 that even a judgment entered without the requisite findings of fact was at most an erroneous judgment and not void. This Court further held in the *Steccone* case that the fact that the judgment was not submitted to appellant for approval before filing did not impair its effectiveness or finality and appealability.

The practice of Trial Judges signing findings of fact and conclusions of law before objections or counter findings have been lodged has been repeatedly held to be proper practice in the California Courts.

California Code of Civil Procedure, Section 634 provides as follows:

> "In all cases where findings are to be made, a copy of the proposed findings shall be served upon all parties to the action and the Court shall not sign any findings thereon prior to the expiration of five days after such service. The Court may direct a party to prepare findings."

In the case of *Treat v. Superior Court* (1936) 7 Cal.2d 636, 62 Pac.2d 147, contentions concerning the signing of findings of fact before service of the same of plaintiff were disposed of by the California Supreme Court where it in part said (p. 638):

> "Thereafter on June 25, 1935, said judge signed the findings of fact and conclusions of law and judgment * * *. Thereafter, on July 8, 1935, plaintiff served and filed notice of his intention to move for a new trial, and also a motion to vacate the judgment and findings of fact and conclusions of law upon the ground as set forth in the motion, that 'no copy of said proposed Findings of Fact and Conclusions of Law were ever served upon or exhibited to the plaintiff or his counsel prior to June 28, 1935.' On August 26th the motion to vacate the findings and judgment was heard by the late Thomas F. Graham who granted the motion to vacate the findings and judgment on the following minute order or entry was then made and entered into the records of said Court: 'In this action, it is ordered by the Court that the Motion to vacate the findings and judgment be and the same is hereby granted. * * *' "

Page 639:

> "* * * The sole questions, therefore, presented is whether or not the minute order complained of, as made and entered, was beyond the power of the trial court to make. * * * (After quoting Section 634 of California CCP the Court says) * * * However, this section has on numerous occasions been held to be merely directory and not mandatory * * * (citing cases) * * * and nowhere in the statutes is the failure of a party to serve the

opposite party with a copy of the proposed findings of fact and conclusions of law specified as a ground for setting aside or vacating a judgment."

In accord:

Noland v. Noland (1941) 44 C.A.2d 780, 113 Pac. 2d 11;

Sandecoff v. Jackson (1920) 46 C.A. 256, 189 Pac. 111;

Peibler v. Seawell (1954) 122 C.A.2d 503, 265 Pac. 2d 109.

III.

THE REQUESTED ORDER NUNC PRO TUNC.

We feel that the California case of *Treat v. Superior Court,* supra, has fully answered all of the questions raised by Appellants adversely to their position. That case clearly holds that even if a minute entry attempting to set aside the judgment and findings had been entered by the trial Court it would not have been a valid order.

There must be a judgment and there must be findings. The trial Court had the power to permit appellants' proctors to argue their objections, this he did. The trial judge had the power to grant amendments to the findings or to even substitute an entire new set of findings, this he refused to do.

What order nunc pro tunc was to be entered in this case? Proctors for appellants appeared on December

18, 1956, long after their rights of appeal had expired and asked for an order nunc pro tunc for the sole and obvious purpose of trying to get an unwarranted and unauthorized extension of time in which to file a notice of appeal.

There was no record requiring correction, despite arguments of appellants' proctors. There was a valid judgment complete with findings, all of which could have been appealed from.

What was the need for the order nunc pro tunc? It was merely and obviously an attempt to get around the appellants' lapsed time of appeal.

The case of *In re Wight,* 134 U.S. 136, 10 S. Ct. 487, 33 L. Ed. 865, cited by appellants (Appellants' Brief, p. 19) concerns a writ of habeas corpus in an embezzlement case and we have carefully read the case and fail to see the relevancy to the case at bar.

The term "nunc pro tunc" has been defined and its uses illustrated in Volume 6 *Moore's Federal Practice* (1953 edition) pages 3537 et seq. as follows:

> "The Latin phrase 'nunc pro tunc' translated literally means 'now for then'. In reference to the rendition of a judgment or the ministerial act of entry, nunc pro tunc signifies that there is a relation back to a designated past date and that the judgment and/or entry are to be given certain anterior effects. * * *
>
> Cases involving an entry of judgment nunc pro tunc generally break down into two groups: (1) those in which one of the parties died after the submission of the case to the lower court for his decision, but before the actual rendition of the

judgment; and (2) those in which a judgment has in fact been rendered by the lower court but the Clerk has failed to perform the ministerial function of entry.

The first group of cases is by far the most numerous. And an entry of judgment nunc pro tunc in such case is generally desirable as a means of relieving litigants from undue harm consumed in judicial deliberation. In the second class of cases, the nunc pro tunc technique has been employed when a party has erroneously assumed that a judgment has been entered, and has consequently appealed from the unentered judgment. To protect the appellant against the Clerk's neglect, the Appellate Court may find that justice would be served by an entry nunc pro tunc of the judgment appealed from, as of the date that the entry should have been made. This is not invariably done, however, and then the appeal is dismissed as premature—oftentimes a wasted policy."

In the light of the fact that appellants have obviously failed to point out any facts or circumstances which would require the granting of the order nunc pro tunc we will not further argue the point.

IV.

APPELLANTS WERE NOT JEOPARDIZED IN THEIR APPEAL RIGHTS BY THE DENIAL OF THE MOTION NUNC PRO TUNC.

As we have heretofore pointed out in our discussion of the case of *McConville v. United States* (supra), the appellants had ample and generous time in which to file a Notice of Appeal from the judgment entered in this case.

They preferred however to wait for over eight months after the Court had ruled adversely to them on their objections to the findings and overruled their counter findings to file an ex parte motion for an order nunc pro tunc.

The use of the *Federal Rule 60* as a medium for entering the back door of appeal instead of the front door is well considered in the case of *Perrin v. Aluminum Co. of America* (supra), which we have previously discussed and quoted from.

Proctors for appellants have devoted several pages of their brief (Appellants' Brief, pages 22-28) in contending that the findings of fact did not conform to the evidence.

In reply to that contention we point out that (1) such contention was not raised in the Specifications of Errors Relied On (Appellants' Brief, page 47), (2) that no transcript of the evidence has been prepared or filed in this appeal and (3) that the findings of fact are factually true and correctly have stated the findings of the trial Court on the entire evidence introduced in the trial of the case.

We also believe that the questions concerning conflicting evidence and the weight of the evidence are not involved in this appeal, which is directed primarily to the refusal of the trial judge to enter the order nunc pro tunc.

CONCLUSIONS.

For the many reasons and the cases cited by us in this brief, we respectfully contend:

1. That the refusal of the trial judge to enter the order nunc pro tunc was a valid exercise of the Court's dicretion.

2. That such refusal is not an appealable order.

3. That a valid judgment and valid findings had been properly entered and filed in this action.

4. That the time for appeal has expired and was not caused by any impropriety of the Court or Clerk.

5. That the appeal should be dismissed.

Dated, San Francisco, California,
August 15, 1957.

Respectfully submitted,
FREDERIC G. NAVE,
BOYD & TAYLOR,
Proctors for Respondent.